

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-766

SURABIAN REALTY CO., INC., & another¹

vs.

CUNA MUTUAL GROUP & another.²

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs, Surabian Realty Co., Inc., and Maja Hospitality Corporation, brought this action in Superior Court against defendants CUNA Mutual Group and CUMIS Insurance Society, Inc. (together, CUMIS), claiming that CUMIS violated G. L. c. 176D and G. L. c. 93A by failing to promptly and fairly settle the plaintiffs' claim against a party insured by CUMIS. On cross motions for summary judgment, CUMIS's motion was allowed and the plaintiffs' motion was denied. The plaintiffs appealed, and we affirm.

Background. Previously, in connection with a failed effort to obtain a commercial loan to develop a hotel on property located in Shrewsbury, the plaintiffs filed a suit (Surabian I) against the lender of the project, Central One Federal Credit

¹ Maja Hospitality Corporation.

² CUMIS Insurance Society, Inc.

Union (Central One), and two of its officers, David A. L'Ecuyer and Craig S. Madonia. Central One, L'Ecuyer, and Madonia were insured by CUMIS under two insurance policies, one issued to Central One and the other issued to its directors and officers. In May, 2015, a jury returned a verdict in favor of the plaintiffs on their claims of promissory estoppel against Central One, their intentional misrepresentation claims against Central One and Madonia, and the negligent misrepresentation claims against all three defendants.³ The trial judge then ruled in favor of the defendants on the plaintiffs' c. 93A claims.

In March, 2016, Central One, L'Ecuyer, and Madonia appealed from the judgment against them and the trial judge's rulings on their postjudgment motions; the plaintiffs also appealed, challenging the dismissal of their c. 93A claims and the prejudgment interest award on the promissory estoppel claim. While the appeals were pending, the plaintiffs sent a letter under c. 93A and c. 176D to CUMIS demanding that it settle the claims against L'Ecuyer (but not Central One or Madonia). CUMIS responded, indicating that the pending appeal rendered liability unclear, and declining to pay the judgment against L'Ecuyer unless Surabian agreed to resolve the claims against all the

³ The jury awarded \$ 1 million in total damages for the negligent misrepresentation claims and an additional \$3.2 million on the promissory estoppel and intentional misrepresentation claims, collectively.

defendants. The plaintiffs then filed the action at issue here, claiming that because liability and damages as to L'Ecuyer were reasonably clear, CUMIS was under an obligation to settle the claims against him without obtaining a settlement of the other claims at issue in the Surabian I appeal, and that its failure to do so violated chapters 93A and 176D. We subsequently affirmed the judgment and postjudgment orders in Surabian I in an unpublished decision pursuant to our rule 1:28. See Maja Hospitality Corp. v. Central One Fed. Credit Union, 91 Mass. App. Ct. 1129 (2017).

In the action now before us, CUMIS moved for summary judgment claiming that because liability was not reasonably clear while the appeals in Surabian I were pending, it was not obligated to settle in a "piecemeal" fashion, i.e., by resolving only the claims against L'Ecuyer. CUMIS also argued that the plaintiffs could not show the unfair or deceptive trade practices required to prove a violation of G. L. c. 93A, § 11. The plaintiffs opposed the motion and filed a cross motion for summary judgment primarily on the ground that CUMIS was collaterally estopped by our decision in Surabian I from arguing that L'Ecuyer's appeal raised any substantial issue. Consequently, the plaintiffs contend, CUMIS engaged in unfair settlement practices in violation of c. 93A and 176D when it declined to settle the claims against L'Ecuyer.

Analysis. We review de novo the allowance of a motion for summary judgment, Dorrian v. LVNV Funding, LLC, 479 Mass. 265, 270 (2018), using the familiar standard. See Carey v. New England Organ Bank, 446 Mass. 270, 278 (2006), quoting Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974). Where the appeal concerns cross motions for summary judgment, "[w]e ask whether the evidence, in the light most favorable to the party losing the contest of cross motions, and the controlling law entitle the prevailing party to judgment." Audubon Hill S. Condominium Ass'n v. Community Ass'n Underwriters of Am., 82 Mass. App. Ct. 461, 465 (2012).

"Although whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact, the boundaries of what may qualify for consideration as a [G. L.] c. 93A violation is a question of law." Silva v. Steadfast Ins. Co., 87 Mass. App. Ct. 800, 806 (2015), quoting Chervin v. Travelers Ins. Co., 448 Mass. 95, 112 (2006). Assuming, without deciding, that CUMIS was required to settle the claims against L'Ecuyer separately from those against Central One and Madonia, that obligation was not triggered unless L'Ecuyer's liability was reasonably clear. See G. L. c. 176D, § 3 (9) (f); Clegg v. Butler, 424 Mass. 413, 421 (1997). "[I]nsurers do not have an obligation to settle as to an insured whose liability is not reasonably clear." O'Leary-

Alison v. Metropolitan Prop. & Cas. Ins. Co., 52 Mass. App. Ct. 214, 217 (2001). "Liability" for these purposes includes both fault and damages. See Clegg, supra.

Our review of the record leads us to the same conclusion reached by the motion judge. The Surabian I cross appeals injected uncertainty as to L'Ecuyer's liability and the amount of damages. In appealing the judgment in favor of the plaintiffs on the negligent misrepresentation claims, L'Ecuyer called into question the reasonableness of the plaintiffs' reliance on the misrepresentations attributed to him. The trial judge's memorandum of decision on the G. L. c. 93A claim made it clear that the judge did not agree with the jury's assessment of the reasonableness of the reliance.⁴ As we noted in Surabian I, the argument that such reliance was unreasonable, while not successful under the directed verdict standard applicable to the appeal, "[was] not without force." See Demeo v. State Farm Mut. Auto. Ins. Co., 38 Mass. App. Ct. 955, 956-957 (1995) (test for determining whether liability has become reasonably clear asks "whether a reasonable person, with knowledge of the relevant facts and law, would probably have concluded, for good reason, that the insurer was liable to the plaintiff").

⁴ The judge wrote, "the reality of the situation was that the plaintiffs began construction before they had a loan commitment and without any firm basis to believe that the loan would ever be made."

Additionally, CUMIS was following the advice of counsel. Although ultimately incorrect, CUMIS's attorney opined, "[l]iability is simply not clear but reasonably and soundly disputed." Counsel's assessment of the odds of the defendants' success on appeal was high and CUMIS was entitled to rely on that assessment. See Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co., 406 Mass. 7, 14-15 (1989) (reliance on advice of counsel some evidence of good faith); Van Dyke v. St. Paul Fire & Marine Ins. Co., 388 Mass. 671, 677 (1983) (same).

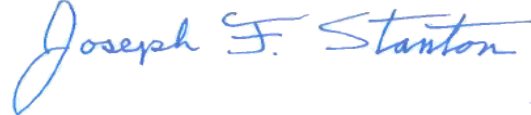
The plaintiffs' cross appeal from the judgment in L'Ecuyer's favor on their c. 93A claim also contributed to the uncertainty of L'Ecuyer's liability and damages. The fact that the insurer may have been defending the c. 93A claim under a reservation of rights⁵ did not eliminate the risk to L'Ecuyer that the judgment in his favor might be vacated on appeal, and that the overall liability and damages attributable to L'Ecuyer's conduct, which would be paid pursuant to an insurance policy with limitations and that also covered codefendants, may be adjusted. The Surabian I cross appeals put L'Ecuyer's liability squarely at issue on both the issue of fault and the issue of damages, and prevented them from becoming "reasonably

⁵ If so, however, as the plaintiffs conceded at a pretrial motion hearing, the insurer has no obligation to make a settlement offer.

clear" until the resolution of the appeal. "A plausible, reasoned legal position that may ultimately turn out to be mistaken -- or simply, as here, unsuccessful -- is outside the scope of the punitive aspects of the combined application of c. 93A and c. 176D." Guity v. Commerce Ins. Co., 36 Mass. App. Ct. 339, 343 (1994). Our conclusion that L'Ecuyer's liability was not reasonably clear until the resolution of the appeal in Surabian I is conclusive on all aspects of the plaintiffs' current appeal. Accordingly, we do not reach the plaintiffs' other arguments.

Judgment affirmed.

By the Court (Vuono,
Wolohojian & Hand, JJ.⁶),



Clerk

Entered: June 25, 2019.

⁶ The panelists are listed in order of seniority.